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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

ORIGINAL

In the Matter of )  
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Market Entry and Regulation of ) IB Docket No. 95-22  
Foreign-affiliated Entities )

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**COMMENTS OF MOTOROLA, INC.**

Motorola, Inc. ("Motorola") hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") in the above captioned proceeding. The Notice solicits comments on proposals to modify the policies governing participation of foreign carriers in the U.S. international telecommunications market. Through its proposals, the Commission seeks to accomplish three goals: (1) promote effective competition in the global communications market; (2) prevent anticompetitive conduct in the provision of international services or facilities; and (3) encourage foreign governments to open their communications markets.

Motorola agrees that these goals are worth pursuing and that increased access to U.S. and foreign markets will foster competition. Motorola also concurs that the Commission should consider the availability of non-discriminatory, open access for U.S.-affiliated carriers when making licensing decisions involving non-U.S. applicants. Accordingly, Motorola supports explicit incorporation of a market access comparison as an important part of the Section 310(b)(4) public interest analysis for common carrier radio services.<sup>1</sup> As detailed herein, the Commission should craft its market access policy in a manner that creates positive incentives for increased market access, promotes predictability and certainty in licensing decisions, and is minimally burdensome. Moreover, the Commission should confirm its intention to review market access in connection with provision of Inmarsat-P services in the U.S. A market access comparison policy that is consistent with these principles will promote the Commission's goals in the most effective manner possible.

Respectfully Submitted By:

*Michael D. Kennedy*  
Michael D. Kennedy  
Director, Regulatory Relations  
Motorola, Inc.  
1350 I Street, N.W., Suite 400  
Washington, D.C. 20005  
(202) 371-6900

<sup>1</sup> Motorola will not address herein the market access proposals concerning Section 214 or Section 310 market access comparisons for broadcast and aeronautical licenses.

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## SUMMARY

Motorola commends the Commission for proposing to consider market access as part of the public interest test under Section 310(b)(4). As the Commission recognizes, incorporating a market access comparison element in radio station licensing decisions should promote domestic and international competition and spur liberalization abroad. To assure that the market access proposal is implemented in a manner that best achieves these important objectives, Motorola urges the Commission to adopt final rules consistent with the following three principles.

First, the market access test should create positive incentives and avoid restricting opportunities for U.S. companies in other nations. To create appropriate incentives for foreign governments and stimulate beneficial investment, the Commission should:

- Confirm that the market access test is an important, but not dispositive, element of the public interest analysis. Flexibility is needed to accommodate varying regulatory and market conditions and to reward nations that are firmly committed to imminent liberalization.
- Focus only on the home market of foreign entities seeking authority under Section 310. Looking at broader "primary markets" would create extreme uncertainty and delay, needlessly diminish competition in the U.S., risk retaliation against U.S. companies that have invested abroad, interfere with accomplishment of GII objectives, and prove ineffective at promoting liberalization.
- Base the market access analysis on similar categories of services. The Commission should use the 310 analysis to examine any market segment in the home market -- wireless, local, and long distance -- in which the U.S. affiliate participates domestically. Within each category, the Commission should consider factors affecting the ability of a U.S. company to provide similar services in the relevant foreign market.

- Base the market access analysis primarily on current conditions in the home market. The test should be used to reward actual or demonstrably imminent liberalization, not vague promises to liberalize in the future.
- Make market access determinations in conjunction with relevant U.S. government agencies. Such close coordination will be essential to avoid undermining bilateral and multilateral trade negotiations.

Second, the Commission should apply the market access analysis in a manner that promotes predictability and certainty. Predictability and certainty in application of the market access analysis will be essential to assure that the new policy is viewed credibly and favorably by our trading partners. To this end, the Commission should:

- Specify all factors that will be considered in the analysis. Ad hoc decision-making, unbridled by prior announcement of the relevant considerations, may appear arbitrary and provoke retaliation. In contrast, up-front delineation of all relevant factors will encourage investment and incent other nations to follow the same "rule of law" approach when addressing requests for entry by U.S. entities.
- Not remove authority granted to nationals of countries that subsequently deny market access opportunities to U.S. entities. The best means of promoting continued open access is to examine each new application on a case-by-case basis. Regressive changes in policy can be dealt with by denying subsequent requests for authority.
- Issue market access determinations as expeditiously as possible. Expedition will enhance faith in the process, promote investment, and create a favorable precedent for other nations in handling requests for authority by U.S. companies.

Third, the Commission should maximize U.S. leverage while avoiding unwarranted commitments of government and Commission resources. In this regard, the Commission should apply a five percent "de minimis" standard to foreign investment from a particular country. Although the 25 percent threshold in Section 310(b)(4) is cumulative, the Commission should apply the market access determination only to aggregate investment from

nationals of a single country creating a greater than five percent stake in the parent of the licensee. Entities with a lesser interest are unlikely to be able either to influence their home market government to liberalize or to determine the policies of the licensee.

Finally, Motorola urges the Commission to commit that it will consider market access in conjunction with the provision of Inmarsat-P services in the U.S. The Commission plainly has such authority under Section 308(c) of the Communications Act and under the International Maritime Satellite Act. Exercising that authority would assist U.S. Big Leo licensees in securing rights for the access and operation of their systems in the home countries of investors in the Inmarsat-P system.

**I. THE COMMISSION'S SECTION 310(b)(4) MARKET ACCESS PROPOSAL MUST CREATE POSITIVE INCENTIVES FOR INCREASED MARKET ACCESS, AND SHOULD NOT INADVERTENTLY RESTRICT OPPORTUNITIES FOR UNITED STATES COMPANIES ABROAD.**

The Commission proposes to incorporate an effective market access standard into the public interest determination made under Section 310(b)(4). Under this proposal, where foreign investment in the parent of a licensee would exceed 25 percent, the Commission would consider whether the foreign entities' "primary markets pass the effective market access test."<sup>2</sup> Motorola agrees that a market access comparison, if tailored as discussed below, will encourage foreign investment and participation in U.S.-based ventures, while simultaneously establishing incentives for foreign countries to open their markets to U.S. companies.

**A. Market Access Should Be An Important, But Not Dispositive Factor, In The Section 310 Public Interest Determination.**

The Notice asks whether the Commission should assess factors beyond effective market access as part of the public interest analysis under Section 310(b)(4).<sup>3</sup> Motorola strongly believes that a degree of flexibility is needed in order to recognize and reward investors from nations that are unalterably committed to imminent liberalization. As recognized by the Commission, due to varying market and regulatory conditions around the world, a flexible approach is crucial to achieving market reform.<sup>4</sup> Indeed, the Commission explicitly rejected "mirror reciprocity" as the standard for evaluating access in order to

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<sup>2</sup> Notice at ¶ 95

<sup>3</sup> Id. at ¶ 95.

<sup>4</sup> Id. at ¶ 41.

"avoid sending a signal that might be interpreted as a closing of our markets."<sup>5</sup> For this same reason, market access should be an important element of the Section 310(b)(4) public interest analysis, but it should not be dispositive.

There may be compelling reasons that are unrelated to the market access determination to allow or disapprove foreign investments in excess of 25 percent. For example, investments above the statutory benchmark might be beneficial even if the foreign market is relatively closed, if necessary to allow a U.S. entity to compete more effectively in the U.S. and abroad, or if the services to be provided using the license are *de minimis*. Conversely, the Commission must have the flexibility to prohibit investments by nationals of a country with open markets, where such investments might threaten U.S. security interests. Consequently, the Commission should give great weight to market access under Section 310(b)(4), but also should consider other specific factors, including the significance of the proposed investment to promotion of competition in global markets, and the national security implications of an application in making public interest determinations.<sup>6</sup>

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<sup>5</sup> Id. at ¶ 49.

<sup>6</sup> As discussed below, however, all the factors to be considered should be specified in the rules adopted in this proceeding, in order to promote certainty and consistency.

**B. Market Access Determinations Should Focus On The "Home Market," Not A Multitude of "Primary Markets."**

The Commission proposes to define "effective market access" as the ability of U.S. carriers to enter the "primary markets" served by the foreign carrier seeking entry.<sup>7</sup> A "primary market," in turn, is defined as "those key markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and traffic flows between the United States and that country are significant."<sup>8</sup> Motorola respectfully submits that this broad definition is unwarranted and unworkable and risks undermining the Commission's objectives.

As an initial matter, the terms "substantial" and "significant" are not easily defined. This lack of precision will chill investment and force the Commission to make difficult, ad hoc determinations with respect to each new petition. The resulting delay would be needlessly compounded by the need to examine a multitude of markets before deciding whether to make a public interest finding. As a result, the benefits of additional competition would be postponed and the Commission's intent to achieve a "more tailored and predictable application of Section 310(b)(4)"<sup>9</sup> would not be realized. In contrast, limiting review to a petitioner's "home market" will effectively promote competition in the U.S. and liberalization abroad while permitting expeditious resolution of Section 310 petitions.

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<sup>7</sup> Notice at ¶ 40.

<sup>8</sup> Id. at ¶ 43.

<sup>9</sup> Id. at ¶ 96.



In addition, a broad definition of "primary market" would diminish competition in the United States. In recent years there has been a proliferation of joint marketing arrangements, federations, and equity investments among telecommunications entities. Accordingly, the Commission will frequently face situations in which an entity seeking U.S. authorization has interests in numerous markets beyond its home country. Denying entry to such an entity despite the fact that the entity's home market is competitive, will delay additional competition in the U.S. market, to the detriment of consumers.

Moreover, regulators in other countries are likely to consider foreign market access when addressing requests for entry by U.S. carriers. However, if those nations adopted a similarly broad interpretation of primary markets, they might well deny entry by U.S. entities even though the U.S. market is largely open. This risk arises because many American carriers have invested in telecommunications providers in protected foreign markets. In the end, this will undermine the incentive of U.S. companies to become facilities-based carriers abroad and frustrate Commission and Administration efforts to promote an advanced Global Information Infrastructure ("GII").

Finally, a broad definition of "primary market" likely will not be effective in encouraging foreign governments other than the home market to liberalize. While the home country government probably will consider opening its market in order to expand foreign investment opportunities for its own companies, governments in third countries simply will not have this incentive. Rather, the service provider in the third country will itself be viewed as "foreign," and is likely to have little ability to pressure the government there to liberalize. In these circumstances, the Commission should not bar U.S. entry by entities whose home

markets offer effective access, in an almost certainly vain effort to trigger liberalization in third countries.

**C. Market Access Determinations Under Section 310 Should Be Based On Categories of Similar Services.**

The Notice recognizes that rigid foreign ownership restrictions would ultimately handicap U.S. companies, and acknowledges that market and regulatory conditions differ significantly from country to country. As a result, the Commission proposes a market access standard that explicitly accounts for such variations, rather than requiring exact symmetry.

Motorola believes that, consistent with this recognized need for flexibility, the market access evaluation under Section 310 should compare access within categories of similar services offered by the new or existing licensee, rather than between specific service types. Motorola does not believe the Commission should limit its investigations of "effective market access" only to considerations of wireless services. Instead, the Commission should interpret its broad public interest mandate to extend its review to wireline services access, if the existing or proposed venture currently provides or seeks to provide such service in the United States.

In certain cases, the need for a Section 310 waiver will arise for a existing licensee if a foreign company seeks to invest in that licensee's current or future operations. In such a case, the Commission should take into consideration the access afforded in the foreign carrier's home market for the service segments in which the licensee presently operates, be they wireless or wireline. In other cases, the applicant will be an entirely new entity seeking to offer a specific range of services through the use of a radio license. In yet other

circumstances, an existing carrier with foreign participants may seek to enter into new operations that require a waiver under Section 310. In all cases, the Commission also should consider all affected market segments.

It is appropriate for the Commission to consider wireline as well as wireless segments. Moreover, given changing technologies and regulatory policies and the need for flexibility, these segments should be broken into broad categories for the Commission's consideration of "effective market access" in the home market. These broad market segments would include, for example, the local, long distance and wireless markets.

Within each of these categories, the Commission should take into account a variety of factors deemed relevant to each case, including the openness and transparency of the relevant structures in the home market(s); the ability of U.S. suppliers to apply for and receive regulatory approvals to provide similar services; the existence of open entry for, and non-discriminatory treatment of, U.S.-based carriers who seek to provide services, whether facilities-based or through resale; licensing, tariffing and other terms associated with the provision of service; the ability of U.S.-based carriers to provide service on price, terms and conditions comparable to those afforded foreign-based competitors; and the existence of bilateral or multilateral agreements with the foreign government of the home market which achieve the above-cited objectives.

The Commission proposes to consider six factors in determining whether effective market access exists for purposes of Section 214: (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the

foreign country; (3) the availability of published, non-discriminatory charges, terms and conditions for interconnection to foreign domestic carrier's facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information; (5) the protection of CPNI; and (6) the existence of an independent regulatory body with fair and transparent procedures. These factors are plainly relevant when considering applications for authority to provide international facilities-based services and would therefore apply to certain investigations regarding market access in this context. However they are not necessarily relevant to all cases. For the wireless segment, specifically, the Commission should also consider the non-discriminatory pricing and availability of spectrum licenses for U.S. entities, the ability to obtain equipment necessary to provide the service at reasonable prices and terms, reasonable interconnection, and the unrestricted use of those licenses.

This approach yields a reasonable degree of flexibility -- recognizing potential differences between the U.S. and other countries -- while enabling an "apples-to-apples" comparison and preserving maximum leverage. Possible alternative approaches suffer significant shortcomings. For example, basing market access determinations on the specific services covered by an application, such as cellular or PCS, would be unrealistically narrow. Factors that are wholly unrelated to a home country's openness to foreign entry, such as lack of infrastructure or an established licensing scheme, may prevent a U.S. company from providing that same service in the foreign country. At the other extreme, a single broad market standard would be too difficult to meet, given reasonable variations in infrastructure development, economic development, and other factors, and would therefore destroy any

leverage to encourage market reform. Moreover, to the extent that the waiver process is to be used as a means of encouraging improvements in market access abroad, we should be realistic about the strength of its leverage. A country is highly unlikely to open its entire telecommunications market in order to ensure one of its national access to an investment in the United States.

**D. The Commission Should Base Its Effective Market Access Standard Primarily On Current Conditions.**

Under the Commission's proposal, effective market access "must exist at the time of entry, or in the near future."<sup>10</sup> Motorola believes that this standard will create problems because it is ambiguous and leaves too much room for governments to make commitments that are never realized. For example, past experience shows that many EU deadlines for market liberalization have gone unmet. Member States have failed to meet the domestic implementation schedules contained in nearly all of the EU-wide telecommunications integration directives, including those on services, terminal equipment, open network provision, and leased lines. Newer Member States have been particularly tardy. In light of these examples, the Commission's access standard should do more than induce commitments to provide access; instead, it must reward actual or demonstrably imminent liberalization.

Motorola accordingly urges the Commission to base its market access test primarily on current circumstances. At the same time, though, the Commission should be willing to consider changes that appear reasonably certain to be implemented in the near future. For

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<sup>10</sup> Id. at ¶ 38 (emphasis added).

example, the enactment of reform legislation that will be implemented within six months could establish the existence of near term change, while general commitments to enact reform legislation would be considered too speculative for a positive access determination.

**E. Market Access Determinations Should Be Made In Conjunction With Relevant Government Agencies.**

Motorola commends the Commission for its intent to "solicit the views of the Executive Branch" on proposed foreign carrier entry.<sup>11</sup> Determinations regarding market access opportunities in the Section 310 context likely will affect United States trade negotiations, and should therefore be coordinated with other interested government agencies. For example, the government is in the midst of negotiations under the auspices of the World Trade Organization to open markets for basic services. A Commission market access determination, if made without considering the status of these or similar negotiations, could complicate broader U.S. negotiating efforts. Accordingly, the Commission should assure that other Executive Branch agencies, including the United States Trade Representative, have appropriate opportunities and regularized procedures to provide input, and the views of those agencies should be given due consideration in determining whether licenses should be granted in particular circumstances.

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<sup>11</sup> Id. at ¶ 45.

## **II. THE COMMISSION'S POLICIES MUST PROMOTE PREDICTABILITY AND CERTAINTY FOR LICENSING DECISIONS.**

Predictability and certainty in the regulatory process are essential in order to create a positive environment for investment. To this end, Motorola urges the Commission to take the following three steps:

First, the Commission should specify all factors that will be considered in the public interest determination.<sup>12</sup> In addition to examining the articulated market access factors and other specific criteria, the Notice proposes to examine unspecified "other public interest factors which might weigh in favor of, or against, allowing entry into the U.S. market."<sup>13</sup> To the extent that the Commission plans to analyze "other factors," it should state what those factors are in its rules in this proceeding in order to allow potential investors reasonably to assess the likelihood that a particular arrangement will be found to be in the public interest.

Second, favorable Section 310(b)(4) market access determinations should not be subject to withdrawal. On at least one occasion, the Commission has conditioned license grants on the continued maintenance of an open home market.<sup>14</sup> Such "snapback" provisions create substantial uncertainties for potential investors and may in fact penalize private companies for government actions that they cannot control. Withdrawal of granted licenses also appears retaliatory, and therefore raises risks for U.S. companies operating

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<sup>12</sup> See, e.g., National Broadcasting Co. v. U.S., 319 U.S. 190, 216 (1943) (The public interest criterion "is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power.").

<sup>13</sup> Id. at ¶ 45.

<sup>14</sup> AmericaTel Order, 9 FCC Rcd 3993 (1994).

abroad. Instead, Motorola suggests that the Commission make its market access determinations on a case-by-case basis. With each new petition, the Commission would have an opportunity to assess whether there has been a change in market conditions, and could apply a negative access determination on a going forward basis.

Third, Section 310(b)(4) determinations should be made as expeditiously as possible. Motorola acknowledges that the market access determinations may involve complex issues, and therefore, may be time-consuming. At the same time, however, prompt decision-making is crucial to attracting foreign investors in the U.S. and setting a precedent for other nations to follow when considering applications by U.S. entities. Moreover, in the trade area, experience has shown that deadlines for action are necessary to persuade other governments to make concessions. Such responsiveness is unlikely if U.S. regulatory actions are indefinitely delayed.

### **III. THE COMMISSION SHOULD EXEMPT FROM MARKET ACCESS DETERMINATIONS CUMULATIVE INVESTMENTS FROM A COUNTRY THAT ARE LESS THAN 5 PERCENT.**

The foreign ownership benchmark in Section 310(b)(4) applies to cumulative investments, not to investments from individual investors or countries. Nonetheless, Motorola believes that the market access determination should be undertaken only with respect to cumulative investments from a country that are greater than 5 percent at the holding company level. Investments below 5 percent simply would not create the ability to control the U.S.-based licensee, and the investors likely would not have, nor choose to exert, any leverage on their governments for the sake of such a small investment. Hence,



subjecting aggregate foreign investment from a country that is less than 5 percent of the total investment to market access scrutiny would serve no reasonable purpose, and would pose unnecessary burdens on both the Commission and foreign investors.

**IV. THE COMMISSION SHOULD CONFIRM ITS INTENTION TO REVIEW MARKET ACCESS ISSUES IN CONNECTION WITH PROVISION OF INMARSAT-P SERVICES IN THE U.S.**

The Commission has previously declared that it would consider market access issues posed by the Inmarsat-P Affiliate when there is an application to provide Inmarsat-P services in the U.S.<sup>15</sup> Since such an application is likely to be made by COMSAT Corp. ("COMSAT") rather than by the Inmarsat-P Affiliate, it would not directly raise foreign ownership issues under the proposed rule. Nevertheless, the Commission should confirm its intention to consider the market access issues posed by any application to provide Inmarsat-P services in the U.S.

Inmarsat is an international organization established to provide important safety of life and property services at sea. Inmarsat was created because private industry was not prepared to provide these important services at that time. Today, Inmarsat continues to enjoy a de facto monopoly on provision of space segment for maritime services in international waters. Virtually all of Inmarsat's investor-signatories are state-owned companies which also control and regulate telecommunications services in their home countries. Inmarsat's proposed entry

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<sup>15</sup> Petition of Motorola Satellite Communications for Declaratory Ruling Concerning Participation by COMSAT Corporation in a New Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices, File No. ISP-94-001, FCC 94-296 (released Nov. 22, 1994) [¶¶ 20-23.]

into land mobile services through the Inmarsat-P Affiliate poses a significant risk that the Inmarsat signatories will use their control of their indigenous telecommunications regulatory structures and public networks to prevent competitive entry of U.S. Big Leo licensees in their home countries.

Although a COMSAT application would not be directly covered by the proposed rule, the Commission has adequate statutory powers to consider the market access and other competitive issues posed by the Application. For example, under Section 308(c), the Commission could consider the market access issues raised by any application for earth stations or receivers to access the Inmarsat-P Affiliate space segment. Congress explicitly provided the Commission with authority to "impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2. . ." of the Cable Landing License Act. In turn, section 2 of the Cable Landing License Act authorizes the withholding or revocation of a license if "such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries. . ." <sup>16</sup> Accordingly, the Commission clearly has the power to withhold or condition any license for provision of Inmarsat-P services if it would assist U.S. Big Leo licensees in securing rights for the access and operation of their systems in the home countries of investors in the Inmarsat-P system. <sup>17</sup>

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<sup>16</sup> Cable Landing License Act of May 27, 1921, Section 2, 47 U.S.C. § 35.

<sup>17</sup> In addition, the Commission has broad authority under the International Maritime Satellite Telecommunications Act to determine whether it is in the public interest for COMSAT to use any facilities in the U.S. to access Inmarsat-P facilities. 47 U.S.C. §§ 752, 753.